85-552

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

YOSH SAKAMOTO, PACIFIC GIFT SUPPLY and TOP ENTERPRISES, INC.,
Petitioners,

v.

DUTY FREE SHOPPERS, LTD., GUAM AIRPORT AUTHORITY and THE GOVERNMENT OF GUAM,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners Yosh Sakamoto, Pacific Gift Supply Inc., and Top Enterprises, Inc., respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 1, 1985.

QUESTIONS PRESENTED

1. Is the Government of Guam bound by the same limitations that prevent states and their political subdivisions from burdening interstate and foreign commerce?

2. Are the Government of Guam and its sub-agencies immune from federal antitrust laws because of their status as federal instrumentalities?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities Cited	iii
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
I. Allowing Guam to burden inte state and foreign commerce conflicts with the intention of Congress, and the case law of the Supreme Court and Third Circuit Court of Appeals	
II. The grant of antitrust immunity to the government of Guam is a judicial incursion on the exclusive right of Congress to make rules and regulations for the territories and is in conflict with the law in the District of Columbia Court of Appeals.	
Conclusion	13

TABLE OF AUTHORITIES CITED

Cases

	Page
Andersen v. Mullaney, 191 F.2d 123, (9th Cir.) aff'd, 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952)	6,7, 8,10
Asiatic Trans-Pacific, Inc. v. Maddox, 371 F.2d 132 (9th Cir. 1967)	10
Buscaglia v. Ballester, 162 F.2d 805 (1st Cir. 1947), *cert. denied*, 332 U.S. 816, 68 S.Ct. 154, 93 L.Ed. 393 (1947)	9
Caribtow v. Occupational Safety and Health Commission, 493 F.2d 1064, (1st Cir. 1974)	9
Chase Manhattan Bank v. South Acres Development Co., 434 U.S. 236, 54 L.Ed.2d 501, 98 S.Ct. 544 (1978)	8
City of Lafayette, Louisiana v. Louisiana Power and Light Co., 435 U.S. 389 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978)	12
Community Communications Co. v. City of Boulder, Colo., 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982)	12
Duty Free Shoppers, Ltd. v. Tax Commissioner, 464 F.Supp. 730 (D.Guam 1979)	10
Examining Board of Engineers, Architects and Surveyors v. Flores De Otero, 96 S.Ct. 2264 (1978)	7
Feldman v. Gardner, 661 F.2d 1295 (D.C. Cir. 1981), *cert. granted*, 102 S.Ct. 3481 (1982), *vacated on other grounds*, 103 S.Ct. 1303 (1983)	13
First National Bank of Brunswick v . Yankton, 101 U.S. 129, 25 L.Ed. 1046 (1880)	5

Granville-Smith v. Granville-Smith, 349 U.S. 1, 75 S.Ct. 553, 99 L.Ed. 773 (1955) 8

Hecht v. Pro Football, Inc., 333 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) 13

JDS Realty Corp. v. Government of Virgin Islands, 593 F.Supp. 199 (D.V.I. 1984) 10

Late Corporation of Latter Day Saints v. U.S., 136 U.S. 1, 10 S.Ct. 792, 34 L.Ed. 478 (1890) 5

Manila Trading & Supply Co. v. Maddox, 335 F.2d 150 (9th Cir. 1964) 10

Murphy v. Ramsey, 114 U.S. 15, 5 S.Ct. 747 (1885) ... 5

Pacific Broadcasting Corp. v. Riddell, 427 F.2d 519 (9th Cir. 1970) 10

Port Construction Co. v. Government of Virgin Islands, 359 F.2d 663 (3rd Cir. 1966) 10

Sea-Land Services, Inc. v. Municipality of San Juan, 505 F.Supp. 533 (D.P.R. 1980) 9,10

Southernland v. St. Croix Taxi Association, 315 F.2d 364 (3rd Cir. 1963) 10

Torres v. Commonwealth of Puerto Rico, 442 U.S. 465, 99 S.Ct. 2425 (1979) 7

Territory of Guam v. Olsen, 431 U.S. 195, 97 S. Ct. 1774, 53 L.Ed.2d 250 (1977) 8

United States v. First National City Bank of Houston, 386 U.S. 361 (1967) 12

U.S. v. Husband R. (Roach), 453 F.2d 1054 (5th Cir. 1971), *cert. denied*, 406 U.S. 935, 92 S.Ct. 1785, 32 L.Ed.2d 136 (1972) 9

United States v. Wheeler, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) 11,12, 13

Constitution

U.S. Constitution Art. I, Sect. 8, Cl. 3 2
U.S. Constitution Art. IV, Sect. 3, Cl. 2 2,4,8

Statutes

15 U.S.C.
§ 15 3
§ 26 3
28 U.S.C.
§ 1331 3
§ 1337 3
§ 1343 3
48 U.S.C.
§ 77 6
§ 90 6
§ 1422 2,4
§ 1423 2,4,6
§ 1423i 2,6

Miscellaneous

Senate Rep. No. 2109, 81st Congr., Reprinted in 1950 U.S. Code Congr. and Ad. News 2840 11

H.R. Rep. No. 1521, 90th Congr., Reprinted in 1968 U.S. Code Congr. and Ad. News 3564 11

Coudert, The Evolution of the Doctrine of Territorial Incorporation, 26 Col. L.Rev. 823 (1926) 7

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals, is reported at 764 F.2d 1285 (9th Cir. 1985) and appears in the appendix hereto. The Opinion of the District Court of Guam is not reported and appears in the appendix hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on July 1, 1985. No Petition for Rehearing or Rehearing En Banc was requested and this Petition for Certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Article 1, Section 8, Clause 3 — The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Constitution of the United States

Article IV, Section 3, Clause 2 — The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

United States Code, Title 48

§ 1422. *Governor and Lieutenant Governor*

The executive power of Guam shall be vested in an executive officer whose title shall be the "Governor of Guam". The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam.

United States Code, Title 48

§ 1423a. *Power of Legislature*

The legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam.

United States Code, Title 48

§ 1423i. *Approval of bills*

. . . All law enacted by the legislature shall be reported by the Governor to the head of the department or agency designated by the President under Section 1421a of this title. The Congress of

the United States reserves the power and authority to annul the same.

STATEMENT OF THE CASE

Guam has is recent years become a resort area for Japanese tourists. Petitioners and Respondent Duty Free Shoppers, Ltd. are competitors in the business of selling gift items to these Japanese tourists to take with them back to Japan for friends and relatives. Petitioners claim that the Japanese tourist market is a unique and separate market; that the Japanese expect and demand that their gift purchases be delivered to them at the airport so that they will not be inconvenienced during their vacation.

Respondent Duty Free Shoppers, Ltd., the Government of Guam and Guam Airport Authority are parties to a contract that gives Duty Free Shoppers, Ltd. the exclusive concession for gift items at the Guam airport. A restrictive covenant in the agreement provides that the Guam Airport Authority may not, and will not, allow anyone to deliver gift items to departing passengers at the airport. The Guam Airport Authority has promulgated and enforced rules and regulations to implement this exclusion and has forbidden and prevented the petitioners from delivering gift items to departing passengers at the Guam International Airport.

Petitioners filed an action in the District Court of Guam alleging that the agreement by the Guam Airport Authority and Duty Free Shoppers, Ltd. violated the Sherman and Clayton Acts and that the prevention of deliveries to departing passengers at the airport violated the commerce clause. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1337 and 1343, and 15 U.S.C. §§ 15 and 26.

The District Court issued summary judgment in favor of defendants dismissing the action, on various grounds. The Ninth Circuit affirmed, based on the conclusion that the Government of Guam is not bound by the negative implications of the commerce clause, and is immune from liability under the antitrust laws because it is an instrumentality of the federal government.

REASONS FOR GRANTING THE WRIT

I
ALLOWING GUAM TO BURDEN INTERSTATE AND FOREIGN COMMERCE CONFLICTS WITH THE INTENTION OF CONGRESS, AND THE CASE LAW OF THE SUPREME COURT AND THIRD CIRCUIT COURT OF APPEALS.

This case marks the first time in history that a popularly elected American local government has been given a power explicitly reserved to the Congress of the United States. This decision give unqualified permission to the Government of Guam and its agencies to ignore all Supreme Court decisions that have restricted state governments and their agencies from burdening interstate and foreign commerce. Not only does this trammel upon the exclusive right of Congress to regulate commerce, but it also interferes with the exclusive right of Congress to regulate the territories by announcing, in direct contradiction of the specific congressional grant of local autonomy, 48 U.S.C. §§ 1422, 1423, that the popularly elected Government of Guam is nothing more than a federal robot, a mere government-owned railroad.

The Court agrees that an incorporated territory may not burden interstate commerce, but because Guam is an unincorporated territory and under the plenary control of Congress, as evidenced by Congress's power to annul Guam legislation, it is not bound by the same limitations that bind incorporated territory governments. Guam may therefore ignore the commerce clause and all Supreme Court decisions delineating its reach.

This analysis is faulty and led the Court to an incorrect conclusion. The language of the Constitution makes no distinction between incorporated and unincorporated territories. Rather, it plainly states that Congress has the power to make all necessary rules for regulating the territories. U.S. Constitution Art. IV, Sect. 3, Cl. 2. Thus Congress has plenary power over all territories, incorporated or unincorporated.

Supreme Court case law makes unequivocally clear that

incorporated territories are not unique in having their legislation subject to annulment by Congress. All territories are subject to this Congressional prerogative. In *First National Bank of Brunswick v. Yankton,* 101 U.S. 129, 25 L.Ed. 1046 (1880), in finding that Congress had expressly validated the issuance of bonds to a railroad, although Congress had annulled legislation of the Dakota Legislative Assembly in the process, the Court explained that:

> "In the Organic Act of Dakota there was no express reservation of power in Congress to annul the acts of the territorial legislature, but none was necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial government. It may do for the territories what the people of the United States may do for the states.

First National Bank of Brunswick v. Yankton, 101 U.S. at 133.

Similarly, the Utah Territorial Legislature was subject to the same restrictions:

> "That the legislative powers of said territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of the act . . . All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States and if disapproved shall be null and of no effect."

Late Corporation of Latter Day Saints v. U.S., 136 U.S. 1, 10 S.Ct. 792, 803, 34 L.Ed. 478 (1890). See also *Murphy v. Ramsey,* 114 U.S. 15, 5 S.Ct. 747 (1885).

An examination of the statutes of Alaska and Guam show that the Congressional grant of legislative power to these two territories was almost identical.

> The legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam . . . 48 U.S.C. § 1423(a) (Supp. 1985).
>
> The legislative power of the territory of Alaska shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States . . . 48 U.S.C. § 77 (1952).

Moreover, Congress had the power to annul legislation enacted by the territory of Alaska:

> All laws passed by the legislature of the territory of Alaska shall be submitted to Congress by the president of the United States, and if disapproved by Congress they shall be null and of no effect.

48 U.S.C. § 90.

The substance of the power Congress exercised over the territory of Alaska is the same with regard to Guam:

> All laws enacted by the legislature shall be reported by the governor to the head of the department or agency designated by the president under Sect. 3 of this Act. The Congress of the United States reserves the power and authority to annul the same.

48 U.S.C. § 1423i.

Because all territories generally, and the territory of Alaska specifically have been held subject to Congressional annulment of legislation, the attempt to distinguish Guam from the former territory of Alaska fails. The Ninth Circuit is in direct conflict with the Supreme Court's affirmance of its decision in *Andersen v. Mullaney,* 191 F.2d 123 (9th Cir. 1951) aff'd, 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952). This departure from clear and established precedent was noted by Judge Hug in his concurring opinion.

> ". . . I am not fully convinced that the commerce clause does not apply to the territory of Guam under the authority of Andersen v. Mullaney, 191 F.2d 123 (9th

> Cir. 1951), aff'd 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952). I find the distinction between the Territory of Alaska and the Territory of Guam somewhat tenuous."

Moreover, the attempted distinction fails not only because of the error in finding the annulment power of Congress unique to unincorporated territories, but also because of the complete inapplicability of the doctrine of territorial incorporation to this issue.

As a legal concept, territorial incorporation developed from the debate over which Constitutional protections applied to the inhabitants of the territories acquired by the United States as a result of the war with Spain. In other words, which provisions of the Constitution restricted Congress' broad powers over the territories under the territorial clause of the Constitution?

Debated questions included whether Congress is bound by the uniformity clause in laying duties on imports from Puerto Rico; whether guarantees of grand jury indictment and trial by jury were applicable in the Philippines, Hawaii and Puerto Rico; and whether the due process clause is applicable in Puerto Rico. *See Torres v. Commonwealth of Puerto Rico,* 442 U.S. 465, 99 S.Ct. 2425, 2428 (1979); *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero,* 96 S.Ct. 2264 (1978) and cases cited therein. *See also Coudert, The Evolution of the Doctrine of Territorial Incorporation,* 26 Col. L.Rev. 823 (1926).

Unlike the due process clause of the fifth and sixth amendment guarantees that impose restrictions on Congress' power, the commerce clause grants a power to Congress. Thus the doctrine of territorial incorporation is inapplicable. Although reasonable men may argue that the fifth amendment's guarantee of individual rights or liberties should or should not operate as a restriction on Congress in its otherwise absolute power over administrating the territories, Congress cannot be limited by its own plenary power under the commerce clause.

The Ninth Circuit recognized this principle in *Andersen v. Mullaney,* supra. In *Andersen,* the Court held that the Territorial Government of Alaska was bound by the same proscription on burdening commerce that bound the states. The

reason for this was not because the commerce clause operated *Ex Proprio Vigore* as a constitutional limitation, because as far as the Constitution was concerned Congress could allow Alaska to burden commerce under its territorial clause powers, article IV, section 3, clause 2. Rather, the Court stated that "we cannot conceive that in granting the legislative power to the territorial legislature it was intended that the power should exceed that possessed by the legislature of a state in dealing with commerce." Id. at 128.

The Supreme Court, in affirming this case, stated regarding Congressional intent:

> "In the light of these sections we cannot presume that Congress authorized the territorial legislature to treat citizens of states the way states cannot treat citizens of sister states. Only the clearest expression of congressional intent could induce such a result. It is not present."

342 U.S. at 420, 72 S.Ct. at 431, 96 L.Ed. at 463.

Clear congressional intent was the key to solving the problems in *Andersen* and it has been used repeatedly to answer analogous questions. Thus, in finding no congressional intent to allow Guam its own supreme court, this Court stated in *Territory of Guam v. Olsen,* 431 U.S. 195, 202, 97 S.Ct. 1774, 1778, 52 L.Ed.2d 250, 256 (1977):

> "First, we should be reluctant without a clear signal from Congress to conclude that it intended to allow the Guam Legislature to foreclose appellate Review by Article III courts, including this Court, of decisions of territorial courts in cases that may turn on questions of Federal law."

In *Chase Manhattan Bank v. South Acres Development Co.,* 434 U.S. 236, 54 L.Ed.2d 501, 98 S.Ct. 544 (1978), the Court found that Guam alone among all the district courts of the land did not have diversity jurisdiction because Congress had not expressly authorized it. In *Granville-Smith v. Granville-Smith,* 349 U.S. 1, 75 S.Ct. 553, 99 L.Ed. 773 (1955), "the rightful nature of territorial legislation was assailed" and the Court simply found that Congress did not intend to give the Virgin

Islands' Legislature power to do what no state had ever attempted.

Each of these cases involved the Court limiting the power of the territory because it found no Congressional intent to allow the territory to exercise the power. These cases explicitly reveal the error of the Ninth Circuit in failing to understand Congress' grant of local autonomy, for they recognize the right of the territory to pass local legislation, but found that the power sought was beyond that intended by Congress. Although as *Andersen* instructs, Congress could give Guam the right to burden commerce, there is no reference in the Organic Act to such power. The Ninth Circuit, however, without any indication of any Congressional intent in support of its radical decision, has given its endorsement to the Territory of Guam to burden interstate commerce. The question, "Has Congress expressly authorized the territory to exercise this power?", has been twisted completely around to frame the question, "Has the commerce clause been extended to Guam?"

The Ninth Circuit reaches this extreme and unprecedented result on the basis of two inapplicable cases, *Buscaglia v. Ballester,* 162 F.2d 805 (1st Cir.), *cert. denied,* 332 U.S. 816 (1947), and *U.S. v. Husband R. (Roach),* 453 F.2d 1054 (5th Cir. 1971), *cert. denied,* 406 U.S. 935 (1972).

Buscaglia is apparently not even followed in the First Circuit. *See Caribtow v. Occupational Safety and Health Commission,* 493 F.2d 1064, p. 1068 n. 11 (1st Cir. 1974); *Sea-Land Services, Inc. v. Municipality of San Juan,* 503 F.Supp., 533, 540 (D.P.R. 1980) (District Court of Puerto Rico describes the conclusion in *Ballester* that the commerce clause is inapplicable to Puerto Rico as "unexpounded dicta.")

Husband R. (Roach) is simply inapplicable to a territory that has been granted local legislative power because the text of the case itself recites that:

> "Congress legislates directly for the Canal Zone, there is no local legislature."

Id. at 1057.

Relying upon this slender authority, the Ninth Circuit rejected

Andersen, supra, and a solid line of case authority within its own circuit that applied the commerce clause to Guam. *See Pacific Broadcasting Corp. v. Riddell,* 427 F.2d 519 (9th Cir. 1970) (gross receipts tax not violative of the commerce clause); *Asiatic Trans-Pacific, Inc. v. Maddox,* 371 F.2d 132 (9th Cir. 1967) (gross receipts tax not violative of the commerc clause); *Manila Trading & Supply Co. v. Maddox,* 335 F.2d 150 (9th Cir. 1964) (gross receipts tax violative of the commerce clause).

Also ignored were cases from the Third Circuit relating to the U.S. Virgin Islands, an unincorporated territory like Guam, that has the power of local legislation. *See e.g. Port Construction Co. v. Government of Virgin Islands,* 359 F.2d 663 (3rd Cir. 1966) (gross receipts tax not violative of commerce clause); *Southernland v. St. Croix Taxi Association,* 315 F.2d 364 (3rd Cir. 1963) (franchise agreement between government and taxicab association preventing interstate travelers from using prior contracted for transportation from airport to hotel violation of the commerce clause).

An ironic feature of the Ninth Circuit's decision is its overruling *Duty Free Shoppers, Ltd. v. Tax Commissioner,* 464 F.Supp. 730 (D.Guam 1979), which held that Guam was bound by the same limitations as binds the states with respect to both the commerce clause and the import/export clause. This case recently was cited with approval in the cases of *Sea-Land Services, Inc. v. Municipality of San Juan,* 505 F.Supp. 533 (D.P.R. 1980), and *JDS Realty Corp. v. Government of Virgin Islands,* 593 F.Supp. 199 (D.V.I. 1984). These latter cases held that neither the Government of Puerto Rico not the Government of Virgin Islands can burden interstate and foreign commerce.

In summary, the decision of the Ninth Circuit has reversed long established precedent, rejected sound reasoning and thrown into confusion the issue of Congress' power over the territories under the commerce clause.

II

THE GRANT OF ANTITRUST IMMUNITY TO THE GOVERNMENT OF GUAM IS A JUDICIAL INCURSION ON THE EXCLUSIVE RIGHT OF CONGRESS TO MAKE RULES AND REGULATIONS FOR THE TERRITORIES AND IS IN CONFLICT WITH THE LAW IN THE DISTRICT OF COLUMBIA COURT OF APPEALS.

The Ninth Circuit has completely ignored or misunderstood the purpose of the Organic of Guam and its amendment. Equating Guam to the Alaska R.R. and other federal administrative or executive type agencies is unprecedented in the case law, contrary to the holding in *United States v. Wheeler,* 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), and conflicts with the law in the District of Columbia Circuit Court of Appeals. The decision also flagrantly violates the clear Congressional intention to grant the people of Guam local self government which was the fulfillment of a treaty obligation undertaken when the Senate ratified the United Nations Charter. *Senate Rep. No. 2109, 81st Congr.,* Reprinted in 1950 U.S. Code Congr. and Ad. News 2849; *H.R. Rep. No. 1521, 90th Congr.,* Reprinted in 1968 Code Congr. and Ad. News 3564. Allowing this decision to stand is an insult to the citizens of Guam who believe they are participating in the democratic process of local government, and it will provide foreign powers hostile to the United States with a legitimate claim that the U.S. is not abiding by its commitment to provide for local self government in its territories.

With this decision the Ninth Circuit has clearly overstepped the boundaries of the judiciary and wandered into the exclusive preserve of Congress. They have done this based primarily on a mistaken understanding of the meaning of *Wheeler. Wheeler,* while stating that Guam is "entirely the creation of Congress" (a statement with which we have absolutely no argument), does not equate Guam with the type of federal agency or instrumentality represented by the Alaska R.R. and the Federal Reserve Bank of Atlanta. Rather, *Wheeler,* and the cases cited therein, at length explains that the relationship of a territory to the federal government is like a city to a state. Territories are subject to the

ultimate control of Congress and cities to the control of the states that created them. They are political subdivisions of their federal and state sovereigns. *Wheeler,* 435 U.S. at 319 n.2, 321 n. 17.

This case is important because now Guam and the Virgin Islands and possibly Puerto Rico and the Northern Mariana Islands will be classified as nothing more than federal robots. The Supreme Court should grant certiorari on this issue because to do otherwise will leave a judicial decision which clearly contradicts the intention of Congress to give Guam self government, an intention that was framed in light of United States obligations under the Charter of the United Nations.

Because the clear intention of Congress is to put Guam not in the status of federal robot but rather in the status of a city under federal sovereignty, it is logical that Guam should adhere to the same laws that apply to cities. Guam with the power of local legislation is in the same position as a city government relative to the antitrust laws. It has the power to pass laws which may interfere with the national policy of promoting competition and may makes choices counseled solely by its own parochial interest without regard to anticompetitive effects. *City of Lafayette, Louisiana v. Louisiana Power and Light Co.,* 435 U.S. 389, 408, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978).

Immunity from antitrust laws is not be lightly implied. *United States v. First National City Bank of Houston,* 386 U.S. 361, 368 (1967). It may be granted only by the sovereign, which in the United States may be only the U.S. or the individual state. *Community Communications Co. v. City of Boulder, Colo.,* 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982). There is simply no authority for the proposition that a local territorial government, whose chief executive officer is elected by the People of Guam, and an autonomous agency of this government, whose directors are appointed by that chief executive, may exempt themselves from federal antitrust laws.

Because *Wheeler* teaches that Guam should be considered a city and *Lafayette* and *City of Boulder* hold that cities are liable under the antitrust laws unless the sovereign immunizes them, the question to be answered in this case should be whether

Congress, as the sovereign, has expressed its intention to immunize Guam from the reach of the antitrust laws.

The District of Columbia Court of Appeals has used this intent test twice in determining the applicability of the antitrust laws to governmental entities in the District of Columbia. In *Hecht v. Pro Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), an agency of the District of Columbia government charged with running the sports stadium (in this case we have an agency of the Government of Guam charged with running the airport) was found liable under the antitrust laws because Congress had not expressed its intention to immunize the board, the court noting that immunity from the antitrust laws was not lightly to be implied. In *Feldman v. Gardner*, 661 F.2d 1295 (D.C. Cir. 1981), *cert. granted*, 102 S.Ct. 3481 (1982), *vacated on other grounds*, 103 S.Ct. 1303 (1983), the District of Columbia Court of Appeals was found to be immune from antitrust challenge because Congress had intended that they be so immune. The Ninth Circuit in addition to being at odds with the U.N. Charter, the expressed intent of Congress, and the case of *United States v. Wheeler*, is also in direct conflict with the District of Columbia Court of Appeals in that it has found antitrust immunity without finding a Congressional intent to immunize.

CONCLUSION

The basic mistake that the Ninth Circuit made in both of these questions is the failure to understand that Guam has a thriving and dynamic local government which does not receive daily operating instructions from Washington. It forged a new concept of federal territories without any basis or authority. It is important for the Supreme Court to grant certiorari in this case to bring order to the case law and coherence to the federal territorial relationship established by the Constitution and the laws of the United States.

Respectfully submitted,

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[Appendices follow]

APPENDICES

Appendix A

District Court of Guam
Territory of Guam
Civil Case No. 82-0009

Yosh Sakamoto, et al.,
Plaintiffs,
v.
Duty Free Shoppers, Ltd., et al.,
Defendants.

[Filed December 7, 1983]

MEMORANDUM ORDER

STATEMENT OF THE CASE

Plaintiffs[1] filed their original complaint in this action February 8, 1982, and then filed an amended complaint on February 16, 1982. The Plaintiffs allege that beginning on or before December, 1976, and continuing to the present, the Defendants Guam Airport Authority and Duty Free Shoppers, Ltd. (hereinafter referred to as the "GAA" and "DFS," respectively) engaged in unlawful combination and conspiracy in restraint of interstate commerce by entering into contracts which conferred upon DFS exclusive rights for the sale and delivery of certain merchandise at the Guam International Airport Terminal (hereinafter referred to as "GIAT") and by enforcing such contracts against the efforts of Plaintiff Pacific Gift Supply (hereinafter referred to as "PGS") to deliver merchandise at the GIAT.

The Plaintiffs further allege that this conduct has harmed them and that it violates Sections 1, 2, and 3 of the Sherman Act, 15 U.S.C. §§ 1-3, 42 U.S.C. § 1983, 48 U.S.C. § 1471, the Fourth, Fifth, and Fourteenth Amendments to the Constitution

[1] The Amended Complaint was originally filed by six plaintiffs. However, the Court dismissed with prejudice the claims of three of those plaintiffs — Hakubotan, Inc., Jenny's Fashion, Inc., and Para Para, Inc. — by a court order dated January 10, 1983, for refusal to respond to DFS' First Set to Interrogatories and First Request of Production of Documents dated June 25, 1982.

of the United States, and the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States. Jurisdiction is invoked by the Plaintiffs pursuant to 28 U.S.C. §§ 1331, 1337, and 1343; and 15 U.S.C. §§ 15 and 26.

On May 16, 1983, Plaintiff "PGS" filed a motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure contending that the exclusive concession agreement between GAA and DFS and the enforcement of such agreement against the efforts of PGS to deliver merchandise at the GIAT violates Section 1 of the Sherman Act, 15 U.S.C. § 1, the Commerce Clause of the Constitution of the United States, the Equal Protection Clause of the Fourteenth Amendment to the Constitution, and "public policy".

The Defendants filed a cross-motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on May 19, 1983. The Defendants maintain that the exclusive contracts between GAA and DFS are lawful, reasonable and procompetitive. The Defendants, in their memorandum in support of summary judgment, addressed every claim set forth by the Plaintiffs in their complaint. The Plaintiffs, however, have not only failed to address certain arguments of Defendants, but have limited their claims to the exclusive delivery rights conferred to DFS by the GAA. This court will, therefore, limit its decision to claims relating to the exclusive delivery rights issue and dismiss the following claims which were not addressed by the Plaintiffs:

1) Claims pursuant to 42 U.S.C. § 1983 and 48 U.S.C. § 1471.

2) Claims pursuant to the due process clauses of the fifth and fourteenth amendments.

3) Claims pursuant to the fourth amendment.

On August 19, 1983, the Plaintiffs filed a motion to amend responses to requests for admissions. The Court heard the motion to amend responses to requests for admissions, the Plaintiffs' partial summary judgment motion and the Defendants' motion for summary judgment on August 30, 1983. The Plaintiffs were represented by William M. Fitzgerald; the Defendant "DFS" was represented by Jay N. Fastow and

William J. Blair; the Defendant "GAA" was represented by Richard Pipes; and the Defendant Government of Guam was represented by Margaret E. Bean, Assistant Attorney General. The Court denied Plaintiffs' motion to amend admissions and took the other motions under advisement.

STATEMENT OF FACTS

The Department of Commerce of the Government of Guam directly managed and operated the GIAT until 1975. In 1975, the Guam Legislature enacted Public Law 13-57, entitled the "Guam Airport Authority Act", creating the Guam Airport Authority ("GAA"), as a public corporation and autonomous instrumentality of the Government of Guam, to manage and operate the GIAT.

In 1967, the Government of Guam entered into an exclusive merchandise concession agreement with Jones & Guerrero Company with regard to the GIAT. In 1972, the exclusive merchandise concession agreement was assigned from Jones & Guerrero Company to DFS with the approval of the Government of Guam. In 1978, the GAA, by competitive bid, offered an exclusive concession at the GIAT for a term of fifteen (15) years with an option for the concessionaire to extend the concession for an additional five years. At this same time, the GAA was also engaged in planning the financing and construction of a new air terminal at the Airport. The construction was to be financed through the sale of revenue bonds, which were to be entirely supported by the payments under the 1978 concession agreement.

The GAA publicized the availability of the concession in the *Pacific Daily News,* the local newspaper on Guam, and the *Wall Street Journal* and made the bid open to any party who could meet the following qualifications set forth by the GAA:

> ". . . being in existence for 5 years, at least 3 years immediate prior experience operating similar airport concessions with annual volume $10 million and financial strength to provide unconditional minimum guarantee, advance cash deposit and start-up capital

> including all tenant improvements . . . [with] [m]inimum acceptable guarantee [of] $15 million with 10 percent advance cash deposit . . ."

A few parties were interested in the exclusive concession but DFS submitted the highest bid (over $140,000,000.) and was awarded the exclusive concession at the GIAT. The concession agreement was executed between GAA and DFS on October 18, 1978. It should be noted that the Plaintiffs did not make a bid, did not object to the bid qualifications set forth by the GAA, and did not seek to influence the GAA to offer sale or delivery privileges on a non-exclusive basis.

On the basis of the guaranteed fees from DFS under the 1978 concession agreement, the GAA sold $43 million in revenue bonds in 1979. Using the funds it received from the sale of these bonds, the GAA began constructing a new terminal complex at the Airport in 1980. The new airport terminal was completed and opened for beneficial occupancy on January 20, 1982, at a cost to GAA in excess of $50 million.

The Plaintiff, PGS, has attempted on numerous occasions to deliver its merchandise to the airport terminal. At first, the Plaintiff would sell its merchandise and accept payment from the tourist and then deliver it to the airport and check it in. In April, 1976, an attorney for DFS informed the airlines that the pre-check-in procedure violated FAA rules and the airlines discontinued this practice. From April until August, 1976, the candy was sold to the tourist and paid for, then delivered to the airport and carried to the check-in counters by PGS employees. The tourist would then pick up the merchandise and check it in.

On June 7, 1976, S. T. Leon Guerrero, Acting Executive Manager of the GAA, sent a letter to Mr. Yosh Sakamoto advising him to "immediately cease delivery of any merchandise to departing passengers at GIAT".

PGS continued the practice of delivering to the check-in counter between September, 1976, and February, 1977.

On February 2, 1977, David Tancap, Executive Manager of the GAA, sent a letter to Mr. Yosh Sakamoto of PGS stating the following:

> "It has again been brought to our attention that you are still delivering candy to departing passengers at the Guam International Air Terminal (GIAT). You were advised to cease delivery of any merchandise to departing passengers at GIAT by my June 7, 1976 letter which you received in August, 1977 [sic]. Therefore, I am again advising you to immediately cease delivery of any merchandise to departing passengers at GIAT. Furthermore, I have instructed our Operations Officer to evict you or your representative from the airport if you continue this practice.
>
> To make myself perfectly clear, I will take all necessary measures under the law to protect the rights of tenants/concessionaires of the Guam Airport Authority (GAA)."

On the basis of Tuncap's instructions, PGS discontinued deliveries to the airport and instead delivered to the hotels. Then the candy was placed on the tour bus and PGS employees would off-load the merchandise and carry it to the check-in counter. This practice continued through 1978 and until February, 1979.

On March 14, 1979, Manual F. L. Guerrero, Executive Manager of GAA, sent a letter to Mr. Sakamoto requesting PGS to cease delivery of goods to passengers or would-be passengers at GIAT. Mr. Sakamoto was further informed that this regulation applied to everyone, not just PGS.

Subsequently, PGS requested that the tour agents and bus drivers assist the tourists with their merchandise at the GIAT. The tour agents and bus drivers were then compensated by PGS for their service.

A letter dated March 10, 1980, was sent by th attorney for GAA notifying the attorney for PGS that the GAA has the authority to prohibit Sakamoto or PGS employees from delivering candy to departing passengers at GIAT pursuant to § 100.3 of Rules and Regulations of the GAA and has the further right to eject Sakamoto or PGS employees from the airport premises pursuant to § 100.6(B) of the GAA Rules and Regulations if they continue such practices.

Subsequently, this lawsuit was filed by the Plaintiffs.

I. GOVERNMENTAL ACTION IMMUNITY

The Defendants maintain that the conduct challenged by the Plaintiffs, i.e., the granting and enforcing by the GAA of exclusive Airport merchandise delivery rights, is immune from antitrust scrutiny since such conduct is governmental action.

The State Action Immunity Doctrine

The Defendants initially contend that the conduct challenged by the Plaintiffs is immune from antitrust scrutiny under the *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) "state action" immunity doctrine. In *Parker, Id.*, the Supreme Court determined, after carefully reviewing the legislative history of the Sherman Act, that Congress intended the Act to restrain only private anticompetitive action, not state action directed by the legislature.

It appears that the Plaintiffs and the Defendants are in agreement that the challenged conduct in this case is governmental action. The Plaintiffs, however, reject the Defendants argument that the *Parker* "state action" immunity doctrine applies to the Territory of Guam. This Court is an agreement with the Plaintiffs that the Territory of Guam cannot be considered a state for the purposes of determining the applicability of the Antitrust laws. It is apparent that the principle of federalism underlies the "state action" immunity doctrine. As the Supreme Court stated in *Parker, Id.* at 351,

> "[i]n a dual system of government in which under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly attributed to Congress."

Thus, since the Eleventh Amendment to the Constitution of the United States does not encompass unincorporated territories, the Territory of Guam lacks the sovereignty of a state.[2]

The Federal Action Immunity Doctrine

The Defendants also maintain that all federal agencies and instrumentalities are absolutely immune from antitrust scrutiny. *Sea-Land Service, Inc. v. Alaska Railroad,* 659 F.2d 243, 244 (D.C. Cir., 1981) *cert. denied,* 455 U.S. 919 (1982); *Feldman v. Gardner,* 661 F.2d 1295 (D.C. Cir., 1981) *cert. granted, District of Columbia Court of Appeals v. Feldman,* 102 S.Ct. 3481 (1982), and *vacated on other grounds,* 103 S.Ct. 1303 (1983); and *Webster County Coal Corp. v. Tennessee Valley Authority,* 476 F.Supp. 529, 532 (W.D. Kentucky, 1979). It follows that the Defendants then assert that the GAA and the Government of Guam are agencies and instrumentalities of the federal government and as such are absolutely immune from antitrust liability. The Plaintiffs, on the other hand, contend that the Territory of Guam should be treated as a municipality and, therefore, not entitled to antitrust immunity.

It is the Court's determination that the Government of Guam and, indirectly, the GAA, are federal agencies and instrumentalities for the purposes of the Antitrust law and that their challenged conduct is immune from antitrust scrutiny. Pursuant to the Organic Act of Guam, 48 U.S.C. § 1421a and § 1423a, Congress expressly created the Government of Guam and authorized it to regulate all matters of local concern. The Government of Guam, acting as an agent and instrumentality of the Congress in this respect, created the GAA as "a public corporation and autonomous instrumentality of the Government of Guam" (§ 62001 of the Government Code of Guam) "to

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[2]Since this Court has determined that the Territory of Guam cannot be considered a State within the context of the Antitrust laws, it will not address the two-prong test applied to independent political subdivisions of a State set forth in *California Retail Liquor Dealers' Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980).

i.e., (a) "the challenged restraint must be one clearly articulated and affirmatively expressed as state policy," and

(b) "the policy must be actively supervised by the State itself".

acquire, construct, reconstruct, purchase, extend, improve, better, operate and maintain airports and related facilities for civil aviation purposes on Guam". § 62003 of the Government Code of Guam.

Although the Government of Guam granted the GAA broad discretionary powers, it is apparent to this Court that the Government of Guam was concerned with the financial stability of the Airport and expressly limited and restricted the GAA's authority in this particular area. First, the Government of Guam enacted a comprehensive statutory scheme to authorize and encourage the issuance of revenue bonds. § 62100 et seq. of the Government Code of Guam. Second, the Government authorized and required the GAA to "manage and operate the Airport in the most efficient manner consistent with the protection of the bondholder" and "to keep the Airport on a self-sustaining basis." §§ 62010 and 62114 of the Government Code of Guam. It is obvious that the main concern of the Government of Guam was to ensure the protection of the bondholder and financial stability of the Airport. In order to assure this necessary protection and stability, after consultation with its financial advisors, the GAA determined that is had to have guaranteed income from a merchandise concession for 15-20 years. (See affidavit of R. M. Stone at p. 4.) It is, therefore, apparent to this Court that the GAA was acting in accordance with the mandate of the Government of Guam when it entered into the exclusive Airport merchandise concession agreement with DFS. As previously stated, DFS submitted the highest bid, over $140,000,000. in guaranteed concession fees for a period of 15 years, (with an option for DFS to extend for an additional five years) and on the basis of such guaranteed fees the GAA was able to sell $43 million in revenue bonds to finance the construction of the new terminal complex at the Airport. If it were not for the exclusive nature of the concession, no firm would have bid the amount bid by DFS to secure the revenue bonds. (See affidavit of R. M. Stone, at p. 5.)

In addition, it is obvious that the Government of Guam contemplated the granting of the exclusive airport concession by GAA since the policy of exclusive merchandise concessions at the Airport has been continually and specifically approved by

the Government of Guam. In 1967, the Government of Guam originally adopted the policy of exclusivity when it directly operated the airport and conferred exclusive concession rights to J & G Company. In 1972, the Government of Guam reaffirmed its policy of exclusivity by assigning the exclusive merchandise concession agreement from J & G Company to DFS. Finally, in 1979, at the request of the Governor, the Government of Guam, impliedly approved the policy of exclusive Airport delivery rights by adopting Resolution I-S, in which is expressed its approval of the GAA's amendment of the exclusive concession agreement with DFS and authorized the sale of bonds which would be supported by revenues accruing under such agreement.

Thus, it is clear to this Court that with respect to the conduct challenged by the Plaintiffs, the GAA was acting as the alter ego of the Government of Guam in its capacity as a federal agency and instrumentality and is to be afforded the same immunity from the Antitrust laws.

The Court feels the need at this time to distinguish the case of *Hecht v. Pro Football, Inc.*, 444 F.2d 931 (D.C. Cir., 1971), *cert. denied,* 404 U.S. 1047 (1972), upon which the Plaintiff has placed great reliance. In *Hecht,* the District of Columbia Armory Board was established by the Department of the Interior to provide a stadium for District of Columbia sports teams. The Board entered into a contract with the Redskins containing a restrictive covenant prohibiting the use of the stadium by any professional football team other than the Redskins for a period of 30 years. The United States Court of Appeals for the District of Columbia Circuit held that the Armory Board was not immune from antitrust liability. The Plaintiffs analogize Washington, D.C. to Guam and the Armory Board to the Guam Airport Authority. The Plaintiffs maintain that Washington, D.C. and the Territory of Guam are both local governments created by the United States Congress and that both the D.C. stadium Board and the GAA are local instrumentalities set up to administer public facilities under those local governments. Therefore, the Plaintiffs contend that the actions of the Government of Guam and GAA are not immune from antitrust liability.

A more recent case from the D.C. Circuit, however, has held that acts of the local Court of Appeals were immune from the antitrust laws, because that court was "plainly a federal instrumentality". *Feldman v. Gardner, supra* at 1307. The *Feldman* court distinguished and clarified its holding in *Hecht,* stating that the Armory Board was not immune from antitrust liability since it was commissioned to operate the stadium as a private venture.

The operation of the GIAT by the GAA can certainly not be characterized as the operation of the private venture. The GIAT is the only commercial airport on the island of Guam providing essential air service to the people of Guam. Additionally, tourism is a major industry on Guam and the airport system is essential to the tourism industry and its expansion. Thus, it is evident that the people of Guam are dependent upon the GIAT for their economic well-being and that the GAA as a public authority maintains and operates the GIAT in the best interest of the public.

With regard to the actions of DFS in relation to the immune conduct of the GAA and the Government of Guam, it is the determination of this Court that such actions of DFS also fall outside the purview of the Sherman Act's prohibition. *Medical Association of the State of Alabama v. Schweiker,* 554 F.Supp. 955, 966 (N.D. Alabama, 1983).

Thus, the challenged conduct of the GAA, the Government of Guam and DFS is immune from antitrust scrutiny.

The Noerr-Pennington Doctrine

The *Noerr-Pennington* doctrine provides that the efforts of private persons to influence the operation of government for their own economic advantage are immune from the operation of the antitrust laws. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers of America v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); and *California Motor Transport Company v. Trucking Unlimited,* 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972).

The Plaintiffs agree that the *Noerr-Pennington* doctrine

immunizes lobbying efforts, but contend that this case is not covered by the doctrine since it involves a conspiracy between DFS and GAA evidenced by a written agreement which results in a restraint of trade. The Defendants reply that the claims filed against DFS by the Plaintiffs relate only to allegations that it influenced the GAA to execute and enforce the exclusive merchandise agreements.

Paragraph 21 of the Plaintiffs' Amended Complaint states:

> "The aforesaid conspiracy consisted of a continuing agreement . . . to obtain an exclusive dealing arrangement for concession sales and deliveries at the Airport, and to prohibit such sales and deliveries by any party other than Defendant Duty Free."

It appears to this Court that Paragraph 21 of the Plaintiffs' Amended Complaint sets forth exactly the type of efforts which are immune from antitrust scrutiny pursuant to the *Noerr-Pennington* doctrine. It is, therefore, the determination of this Court that even if DFS engaged in such efforts it is immune from antitrust liability.

However, as evidenced by the affidavit of R. M. Stone, the exclusivity of the Concession Agreement resulted from the GAA's unilateral decision to offer such sale and delivery rights on an exclusive basis. Thus, there was no active government involvement in restraint of trade, no concerted action and, therefore, no violation of Section 3 of the Sherman Act. *United States v. Colgate & Company*, 250 U.S. 300, 39 S.Ct. 465, 63 LE 992 (1919).

II. STANDING

In addition to the challenged conduct of the GAA, the Government of Guam and DFS being exempt from antitrust scrutiny on the basis of the federal action immunity and the Noerr-Pennington doctrine, this Court further concludes that the Plaintiffs do not have standing to bring this action.

Title 15 U.S.C. § 15(a) (Section 4b of the Clayton Act) states as follows:

> ". . . any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

In order to have standing under § 15, the Plaintiff must establish injury to his business or property that occurred by reason of an antitrust violation. The Plaintiff must further show that the loss to his business or property was caused by the alleged antitrust violation. *Solinger v. A & M Records, Inc.*, 586 F.2d 1304, 1308-1309 (9th Cir., 1978), *cert. denied*, 441 U.S. 908 (1979).

Legal Injury to Business or Property

The GAA and the Government of Guam are fully empowered to regulate the commercial use of the Airport. In fact, without written permission from GAA, it is unlawful for anyone to use Airport premises for commercial purposes. Sections 3030.3 and 3039.5 of the GAA Rules and § 62013 of the Government Code of Guam. As the Plaintiffs admit, they have never received permission from GAA or the Government of Guam to sell or deliver goods at the Airport. Thus, the Plaintiffs, by reason of the exclusive merchandise concession agreements and their enforcement, have not been deprived of any legal right which they had previously and thus cannot claim any legal injury to their business or property.

Furthermore, the Plaintiffs have no right to conduct their businesses on others' property, [*Donovan v. Pennsylvania Company*, 199 U.S. 279, 26 S.Ct. 91, 50 L.Ed. 192 (1905) and *Export Liquor Sales, Inc. v. Ammex Warehouse Company, Inc.*, 462 F.2d 251 (6th Cir., 1970), *cert. denied*, 400 U.S. 1000 (1971)] and no right to deal with the GAA or the Government of Guam. See *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940).

Additionally, the GIAT is not, as the Plaintiffs contend, a facility which is essential to the ability of the Plaintiffs to conduct their businesses. As noted in *Hecht v. Pro Football, Inc.*, 570 F.2d 982, 993 n. 45 (D.C. Cir., 1977), *cert. denied*, 436 U.S. 956 (1978), a facility is essential to the ability of competitors to do business, where, without access to that facility, "all possible competition is by definition excluded". As evidenced by the Plaintiffs' admissions, they have businesses and have been able to conduct such businesses and earn profits without the use of the Airport to make their commercial deliveries. To permit the Plaintiffs to use the Airport to make their commercial deliveries is certainly not essential to their businesses; it would merely provide an added convenience to their customers.

Thus, the Plaintiffs have failed to establish any legal injury to their businesses.

Antitrust Injury

The second element necessary to establish standing is that a Plaintiff must show an antitrust injury, i.e., that he has been injured by a decrease in competition. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). As the Defendants correctly argue, no one has the right to do business at GIAT without the written permission of the GAA; so by the GAA granting the DFS concession, competition has actually increased the sale of merchandise in Guam since such sale and delivery services provided by DFS at the Airport would have been non-existent. It must be emphasized that the Plaintiffs are not being denied the use of the GIAT for collateral non-transportation purposes, i.e., to make commercial deliveries. They are not being deprived of the use of the GIAT for transportation purposes.

Thus, there has been no antitrust violation or injury.

Causal Nexus between Antitrust Violation and Injury

The Plaintiffs have failed to convince this Court that their purported injury was the result of the alleged unlawful conduct.

When the 1967 concession agreement was awarded by the Government of Guam, the Plaintiffs' businesses were non-existent. In 1978, it was the unilateral decision of GAA, pursuant to its statutory authority, to grant an exclusive concession to insure the financial stability of the airport and the protection of the bondholders. Additionally, it was the Plaintiffs' failure in 1978 to offer bids or to submit proposals to the GAA in an attempt to influence the GAA to alter the terms of the exclusive concession.

Moreover, it is evident that the Plaintiffs do not have the financial ability to meet the 1978 bid qualifications established by the GAA for the exclusive airport concession and, therefore, are not able to engage in the business from which they maintain they were excluded.

Thus, the Plaintiffs have failed to establish a causal nexus between the alleged antitrust violation and the purported injury.

ALLEGED UNLAWFUL CONDUCT IS REASONABLE

In order for a restraint of trade to be in violation of the antitrust laws, it must be "unreasonable" and anticompetitive. *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376, 1381 (9th Cir., 1981), *cert. denied*, 454 U.S. 831 (1981) and *A. H. Cox & Company v. Star Machinery Company*, 653 F.2d 1302, 1305 (9th Cir., 1981). There are two rules which courts apply to determine whether conduct is unreasonable or anticompetitive. The first rule is the *per se* rule, i.e., that the conduct is unreasonable per se. The second rule is the rule of reason. *Ron Tonkin, supra.*

When a court applies the rule of reason test, it inquires as to the effect the challenged conduct has on competition. *Ron Tonkin, supra*, at 1388. If, however, the court identifies conduct which has been held to be unreasonable per se, it is barred from inquiring as to its reasonableness. In order for conduct to be conclusively presumed to be unreasonable, it must have a pernicious effect on competition and lack any redeeming virtue. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

The Plaintiffs maintain that the challenged conduct in the case at bar is unreasonable per se. This Court does not agree. First, there is a need to distinguish between horizontal restraints and vertical restraints. A horizontal restraint is an agreement between competitors to refuse to deal with one or more persons, while a vertical restraint involves combinations of parties on different levels of the distribution system. It has been held that horizontal restraints are unreasonable per se. *Ron Tonkin, supra.*

The Plaintiffs do not contend that the challenged conduct amounts to a horizontal restraint but they do contend that the challenged conduct is unreasonable per se since it is a vertical restraint that has the presence of a horizontal element. In other words, the Plaintiffs contend that through the concerted action of DFS and the GAA, the GAA has refused to deal with the Plaintiffs (competitors of DFS) and, hence, that the per se rule should be applied. This Court, however, must reject this argument. As previously mentioned, the exclusivity of the Airport concession agreement did not result from concerted action between DFS and the GAA, but from the unilateral decision of the GAA to offer sale and delivery rights on an exclusive basis. Even if this Court infers that DFS and the GAA acted in concert, this Court is only justified in applying the per se rule if "the challenged conduct clearly had, or was likely to have, a pernicious effect on competition and lacked any redeeming virtue." *Ron Tonkin, supra* at 1387. Such is not the case. It has already been stated in this decision that competition has actually been increased by the GAA permitting DFS to conduct business on the GIAT premises and that the exclusive concession agreement was essential to the financial stability of the Airport and benefits the tourism industry and the economy of the people of Guam.

Furthermore, the exclusive concession agreement is reasonable as a matter of law because it was offered pursuant to an open and fair competitive bid. *Parmelee Transportation Co. v. Keeshin,* 292 F.2d 794 (7th Cir., 1961) *cert. denied,* 368 U.S. 944 (1961) and *Bustop Shelters, Inc. v. Convenience & Safety Corp.,* 521 F.Supp. 989, 997 (S.D. N.Y., 1981).

III. THE STATUTE OF LIMITATIONS AND THE DOCTRINE OF LACHES

Finally, this Court determines that all claims filed by the Plaintiffs are barred by the four-year statute of limitations pursuant to 15 U.S.C. § 15b (Section 4b of the Clayton Act) and the doctrine of laches.

Title 15 U.S.C. § 15b states as follows:

"§ 15b. Limitation of actions.

> Any action to enforce any cause of action under sections 15, 15a, or 15c or this title shall be forever barred unless commenced within four years after the cause of action accrued . . ."

It should also be noted that the above four-year statute of limitations period has been used by the Ninth Circuit as a guideline for the computation of the laches period in antitrust suits. *Aurora Enterprises v. National Broadcasting Co.*, 688 F.2d 689, 694 (9th Cir., 1982).

Statute of Limitations

The Defendants maintain that the Plaintiffs' cause of action accrued in 1976 or at least in 1977, the date of the Defendants' final refusal to deal with the Plaintiffs, and thus, this action is barred by the four-year statute of limitations. In a case such as this, where the Plaintiffs' claim is based upon the Defendants' refusal to deal with it, i.e., to allow Plaintiffs the right to sell or deliver at the airport terminal, the Plaintiffs' cause of action accrued at the time the Defendants made a final refusal to deal and no new or continuing claims are created by subsequent iterations of that refusal to deal. *In Re Multi-district Vehicle Air Pollution*, 591 F.2d 68 (9th Cir., 1979.), *cert. denied*, 444 U.S. 900 (1979) and *David Orgell, Inc. v. Geary's Stores, Inc.*, 640 F.2d 936, 938 (9th Cir., 1981), *cert. denied sub. nom. David Orgell v. Joseph Wedgwood & Sons*, 102 S.Ct. 92 (1981).

As evidenced by the Plaintiffs' complaint (Paragraph 22(b) and (m) of Plaintiffs' amended complaint), and the letter from S. T. Leon Guerrero, the Acting Manager of the GAA, to Mr. Sakamoto dated June 7, 1976, the Plaintiffs have known since

sometime prior to December, 1976, that their deliveries to the Airport were prohibited by the GAA. Even if Plaintiffs did not recognize the 1976 refusal to deal as absolute and final, it is evident that they recognized the refusal to deal as final in 1977. As stated in paragraph 22(c) of their complaint ". . . GAA forced Pacific Gift Supply to cease making delivery of any merchandise to departing passengers at the Airport in February, 1977". The 1977 final refusal to deal is further evidenced by the letter from David Tuncap, Executive Manager of GAA, to Mr. Y. Sakamoto, Pacific Gift Supply Company, dated February 2, 1977, in which the following was stated:

> "It has again been brought to our attention that you are still delivering candy to departing passengers at the Guam International Air Terminal (GIAT). You were advised to cease delivery of any merchandise to departing passengers at GIAT by my June 7, 1976 letter which you received in August, 1977 [sic]. Therefore, I am again advising you to immediately cease delivery of any merchandise to departing passengers at GIAT. Furthermore, I have instructed our Operations Officers to evict you or your representative from the airport if you continue this practice.
>
> To make myself perfectly clear, I will take all necessary measures under the law to protect the rights of tenants/concessionaires of the Guam Airport Authority (GAA) . . ."

Thus, the Plaintiffs' cause of action arose at least by 1977 and its claim filed in February, 1982, is barred by the four-year statute of limitations.

The Plaintiffs argue that their cause of action accrued in October, 1978, the date that the exclusive concession agreement between DFS and GAA was executed and this is still within the four-year statute of limitations period. This Court does not agree. The Defendants' final refusal to deal was expressed at least by 1977, and the offer of the new exclusive airport concession in 1978 in no way detracted from its finality since the policy of exclusive airport concessions at the Airport has been continually and specifically approved and enforced by the

Government of Guam and the GAA since 1967. Thus, the Plaintiffs had no reason to believe that the 1978 airport concession agreement would not be in conformity with the policy of exclusivity adopted by the GAA and the Government of Guam.

The Plaintiffs also contend that since they were hopeful of a work-out arrangement through March, 1980, their cause of action did not accrue until that time. This Court rejects this contention on the basis that the Plaintiffs cannot toll the running of the statute of limitations by claiming that they still had a hope of dealing with the Defendants. *Orgell, Inc., supra.*

Doctrine of Laches

The Court also feels that this is an appropriate case to invoke the application of the doctrine of laches since the Defendants have been prejudiced by the five-year delay of the Plaintiffs in bringing this suit. More specifically, the Plaintiffs could have filed their suit prior to 1978, or in 1978 when the new airport concession agreement was up for bid. However, the Plaintiffs *chose to wait until* after DFS guaranteed fees in the amount of $140,000,000. in the concession agreement, the GAA sold $43 million in revenue bonds in 1979 supported by the fees from the concession agreement, the GAA began to build a new airport terminal complex in 1980, and the new terminal complex was completed in 1982 at a cost in excess of $50 million to the GAA. It would be inequitable to permit the Plaintiffs to attempt to invalidate the concession agreement at this time after such a lengthy delay and after having allowed the Defendants to act in substantial reliance on the validity of such concession agreement.

IV. COMMERCE CLAUSE

The Plaintiffs also maintain that the restriction on deliveries to the Airport is an unreasonable burden on interstate commerce in violation of the Commerce Clause, Article I, Section 8, Clause 3, of the United States Constitution. This Court determines that there is absolutely no merit to this contention since Article I, Section 8, Clause 3 of the United

States Constitution has not been extended to Guam. 48 U.S.C. § 1421b(u).[3]

However, even if the Commerce Clause were extended to Guam, it is the Court's decision that the alleged conduct of the Defendants does not constitute an unreasonable burden on interstate commerce in violation of the Commerce Clause since, as previously mentioned, the Plaintiffs have no right to conduct their businesss at the airport terminal. Also, the fact that the GAA has permitted DFS to do business at the airport terminal has actually facilitated commerce. The guaranteed concession fees have provided the necessary revenues for the construction, maintenance and operation of the airport thus benefiting the tourism industry and the economic well-being of the people of Guam.

Additionally, since this Court has determined that the alleged conduct is immune from Sherman Antitrust scrutiny under the federal immunity doctrine, such conduct cannot be found to violate the Commerce Clause. The Congress in enacting the Sherman Antitrust Act has exercised its plenary commerce power to its fullest extent. *McClain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 241, 100 S.Ct. 502, 62 L.Ed.2d 441 (1979) and *United States v. American Building Maintenance Industries*, 422 U.S. 271, 278, 95 S.Ct. 2150, 45 L.Ed.2d 164 (1975). Thus, it follows that if the federal immunity doctrine is applicable to Sherman Act claims it is also applicable to a claim under the Commerce Clause. See *Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648, 653, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981).

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[3]Section 1421b(u) of Title 48 USCA states in pertinent part as follows:

> "(u) The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

V. EQUAL PROTECTION

Section 100.3 of the GAA Rules and Regulations states as follows:

> "No person shall carry on any commercial activity at the airport without the written consent of the authority."

The Plaintiffs maintain that the granting of the exclusive delivery rights to DFS was an arbitrary and capricious application of the regulation by the GAA which has created an invidious discrimination by denying use of the GIAT to one business while granting it to another in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

This argument must fail since the Plaintiffs have no right to conduct their businesses at the airport terminal and the exclusive concession agreement was granted pursuant to a fair and competitive bidding procedure. The Plaintiffs were not discriminated against; they merely failed to seek the exclusive concession when it was offered and further failed to offer a proposal to the GAA concerning the granting of non-exclusive delivery privileges.

Moreover, the equal protection law will not reach a situation where a government is engaged in economic regulation that is rationally related to a legitimate governmental interest. *City of New Orleans v. Dukes,* 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) and *Benson v. Arizona State Board of Dental Examiners,* 673 F.2d 272 (9th Cir., 1982).

In the case at bar, the granting of the exclusive airport concession by the GAA pursuant to its statutory authority passes the rationality test. The purpose of the exclusive concession was to maximize Airport revenues to expand and improve the operations of the Airport and ensure the financial stability of the Airport, thereby promoting the tourism industry and the economic well-being of the Territory of Guam. This Court concludes that the GAA and the Government of Guam could reasonably decide that in order to expand and improve the operations of the GIAT, keep the airport on a self-sustaining basis and protect its bondholders, that it needed to grant an

exclusive merchandise concession agreement with guaranteed income from such concession for a period of at least 15 to 20 years to a party who could meet the bid qualifications set forth by the GAA. *supra, p. 0.*

Thus, this Court determines that there is no denial of equal protection since the judgments of the GAA and the Government of Guam are rationally related to a legitimate governmental interest.

CONCLUSION

There being no material issue of fact in dispute, it is the determination of this Court that the Defendants are entitled to their motion for Summary Judgment as a matter of law. To hold otherwise would result in a substantial loss of guaranteed concession fees for the GIAT[4] which, in turn, would have a devastating effect on the financial stability of GIAT, GAA's ability to operate, maintain and improve the Airport, tourism, the economy of Guam, and the people of Guam.

Thus, Plaintiffs' Partial Motion for Summary Judgment is denied and the Defendants' Motion for Summary Judgment is granted.

So Ordered.

Dated this 6th day of December, 1983.

CRISTOBAL C. DUENAS
Judge, District Court of Guam

[4]If there is an interruption or loss of any of the concessionaire's exclusive rights for a period in excess of sixty (60) days, the guaranteed fee to GAA in the amount of $140,000,000. will be reduced to an amount in no event greater than $74.1 million. Concession Agreement dated October 18, 1978, §§ 1.06, 7.01(e) and 7.02(b).

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 84-1587

D.C. No. C-82-0009-CCD

Yosh Sakamoto, et al.,
Plaintiffs-Appellants,
v.
Duty Free Shoppers, Ltd., et al.,
Defendants-Appellees.

OPINION

Argued and Submitted November 8, 1984

Filed July 1, 1985

Appeal from the District Court of Guam
Territory of Guam
Cristobal C. Duenas,
District Judge, Presiding

BEFORE: HUG, TANG, and SCHROEDER, Circuit Judges.

SCHROEDER, Circuit Judge.

The plaintiffs are in the business of selling gifts to tourists in Guam. They brought this action challenging the legality of an exclusive concession agreement giving one of their competitors, Duty Free Shoppers, Ltd., exclusive rights to sell and deliver certain kinds of merchandise to departing passengers at the Guam Airport Terminal. The defendants in this suit are the parties to the concession agreement: Duty Free, the Government of Guam, the Guam Airport Authority, and the Authority's executive manager.

The district court granted summary judgment for the defendants and dismissed the action. The plaintiffs' principal contentions on appeal are that the concession agreement burdens

interstate and foreign commerce in violation of the Commerce Clause of the United States Constitution and violates the antitrust laws. We affirm.

The business of plaintiffs and Duty Free is primarily aimed at Japanese tourists in Guam who purchase gifts or "omiyage" to carry back to Japan. The exclusive concession practice in question here began in 1967, and the current contract was entered into in 1978 as the result of competitive bidding. Duty Free submitted the highest bid, $140 million, and was awarded the fifteen year concession which gave it the exclusive right to sell and deliver specified merchandise at the airport. Proceeds from the contract represent a major source of funding for the construction and maintenance of the airport terminal.

In their challenge to the contract as violative of the commerce clause, plaintiffs do not contest the right of the Government of Guam and the Airport Authority, its agency, to limit by contract the number of businesses permitted to make sales on the premises of the airport. Nor do plaintiffs contend that the contract directly interferes with their ability to sell to customers elsewhere. Plaintiffs complain about the limitation on their right to deliver goods at the airport. They contend that the exclusive contract with Duty Free, which prevents them from delivering previously purchased merchandise to departing passengers as they arrive at the airport, is an undue burden on interstate and foreign commerce.

The defendants' threshhold response to this argument, and one with which we agree, is that the limitations which the commerce clause places upon the power of state governments to burden commerce do not apply to the Government of Guam because Guam is not a state. The defendants correctly point out that these limitations on states, the "negative implications" of the commerce clause, flow from the commerce clause's grant of plenary authority over commerce to Congress. "[T]he states have not been deemed to have authority to impede substantially the free flow of commerce . . . or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Southern Pacific Co. v. Arizona,* 325 U.S.

761, 767, 65 S.Ct. 1515, 1519, 89 L.Ed. 1915 (1945) (footnote omitted). The historical role of the commerce clause has been confined to limiting regulatory and taxing actions by states which may interfere with federal sovereignty. *See* L. Tribe, *American Constitutional Law* at 336 (1978), *quoted in Reeves, Inc. v. Stake,* 447 U.S. 429, 437, 100 S.Ct. 2271, 2277, 65 L.Ed.2d 244 (1980).

Since Guam is an unincorporated territory enjoying only such powers as may be delegated to it by the Congress in the Organic Act of Guam, 48 U.S.C. § 1421a, the Government of Guam is in essence an instrumentality of the federal government. *See United States v. Wheeler,* 435 U.S. 313, 320-21, 98 S.Ct. 1079, 1084-85, 55 L.Ed.2d 303 (1978). Plenary control by Congress over the Guamanian government is illustrated by the provision that Congress may annul any act of Guam's Legislature. 48 U.S.C. § 1423i. Defendants therefore conclude that the negative implications of the commerce clause, designed to preserve congressional authority, cannot limit the Guamanian government, which is a creation of Congress itself. *Wheeler,* 435 U.S. at 321, 98 S.Ct. at 1085, 55 L.Ed.2d 303.

While the reported decisions considering this or similar questions are few in number, they support defendants' position. In *Buscaglia v. Ballester,* 162 F.2d 805 (1st Cir.), *cert. denied,* 332 U.S. 816, 68 S.Ct. 154, 92 L.Ed 393 (1947), the First Circuit held that the commerce clause did not restrict the unincorporated Territory of Puerto Rico because Congress had the power under the territories clause to limit territorial action "even to the extent of annuling local legislation." *Id.* at 807. *Cf. Sea-Land Service, Inc. v. Municipality of San Juan,* 505 F.Supp. 533 (D.P.R. 1980) (decided after Puerto Rico became a commonwealth and holding that although the commerce clause does not apply to Puerto Rico ex proprio vigore, its prohibitive effect is binding on the commonwealth through the territories clause).

In *United States v. Husband R. (Roach),* 453 F.2d 1054 (5th Cir. 1971), *cert. denied,* 406 U.S. 935, 92 S.Ct. 1785, 32 L.Ed.2d 136 (1972), the Fifth Circuit held that the Governor of the Canal Zone was not subject to the limitations imposed on a state legislative body by the commerce clause. *Id.* at 1059-60. The

court reasoned that since Congress retains plenary power to regulate the territories, U.S. Const. art. IV, § 3, cl. 2, and to regulate interstate and foreign commerce, U.S. Const. art. I, § 8, cl. 3, the Governor of the Canal Zone as Congress's "delegate," is not subject to the commerce clause limitations. 453 F.2d at 1059-60. Scholarly commentary agrees that constitutional restrictions on the states' regulation of interstate commerce do not extend to unincorporated territories. Leibowitz, *United States Federalism: The States and the Territories,* 28 Am. U.L. Rev. 339 (1979); Leibowitz, *The Applicability of Federal Law to Guam,* 16 Va.J.Int'l.L. 21 (1975); Fuster, *The Origins of the Doctrine of Territorial Incorporation and Its Implications Regarding the Power of the Commonwealth of Puerto Rico to Regulate Interstate Commerce,* 43 Rev.Jur.U.P.R. 259 (1974).

Ninth Circuit precedent is not to the contrary. In *Andersen v. Mullaney,* 191 F.2d 123 (9th Cir. 1951), *aff'd* 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952), we held that while the limitation on state regulation of commerce through the commerce clause did not apply by its own force to the Territory of Alaska, the legislative power granted to the Territorial Legislature was such that the territory should be treated as if it were a state. Alaska at that time was an incorporated territory, well on its way to statehood, and all provisions of the United States Constitution applied. Act of August 24, 1912, ch. 387, § 3, 37 Stat. 512 (codified at 48 U.S.C.A. § 23 (1952).

The distinction between incorporated territories which are thought of as future states, see *Granville-Smith v. Granville-Smith,* 349 U.S. 1, 5, 75 S.Ct. 553, 555-56, 99 L.Ed. 773 (1955) and unincorporated territories, to which only the "essentials" of the Constitution apply, is not new. It goes back to the 1901 series of Supreme Court decisions known as the insular cases: *Downes v. Bidwell,* 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088 (1901); *Armstrong v. United States,* 182 U.S. 243, 21 S.Ct. 827, 45 L.Ed. 1086 (1901); *Dooley v. United States,* 182 U.S. 222, 21 S.Ct. 762, 45 L.Ed. 1074 (1901); *DeLima v. Bidwell,* 182 U.S. 1, 21 S.Ct. 743, 45 L.Ed. 1041 (1901); *see also Downes v. Bidwell,* 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088 (White, J., concurring). History and the views of scholars and judges who have focused on the issue all support our conclusion that the limitations the

commerce clause places on the powers of states to regulate commerce do not affect the government of the unincorporated Territory of Guam.

This court has never directly addressed the applicability of the commerce clause's negative implications to unincorporated territories like Guam. We have, however, in three cases, assumed without discussion that the commerce clause limits the government of Guam in the same manner that it limits the states.[1] *See Pacific Broadcasting Corp. v. Riddell,* 427 F.2d 519 (9th Cir. 1970) (gross receipts tax not violative of the commerce clause); *Asiatic Trans-Pacific, Inc. v. Maddox,* 371 F.2d 132 (9th Cir. 1967) (gross receipts tax not violative of the commerce clause); *Manila Trading & Supply Co. v. Maddox,* 335 F.2d 150 (9th Cir. 1964) (gross receipts tax violative of the commerce clause).

We do not view these cases as controlling precedent on the applicability of the commerce clause to Guam. In those cases, this court simply assumed that the commerce clause applied, but the issue was never raised or discussed. Such unstated assumptions on non-litigated issues are not precedential holdings binding on future decisions. *See United States v. L.A. Tucker Truck Lines,* 344 U.S. 33, 37-38, 73 S.Ct. 67, 69, 97 L.Ed. 54 (1952) (prior decision is not binding precedent on point neither raised by counsel nor discussed in the opinion of the court in that case); *Webster v. Fall,* 266 U.S. 507, 511, 45 S.Ct. 148, 149, 69 L.Ed. 411 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not be considered as having been so decided as to constitute precedents."); *Matter of Baker,* 693 F.2d 925, 925-26 (9th Cir. 1982) (prior case found not to have established controlling precedent on issue before the court since the question at issue was neither contested not ruled upon in that case); *Sethy v.*

[1] The district court of Guam has reached inconsistent results on the question of commerce clause applicability. *Cf. Ambros, Inc. v. Maddox,* 203 F.Supp. 934 (D. Guam 1962) (court refused to hold that Congress had not conferred upon Guam the power to impose burdens on commerce by its approval of legislation implicit in its failure to annul). With *Duty Free Shoppers, Ltd. v. Tax Commissioner,* 464 F.Supp. 730 (D. Guam 1979) (because no language exists in the Guam Organic Act which indicates Congressional intent to suspend the commerce clause's operation, the court concluded that Guam is bound by the limitations imposed by the commerce clause).

Alameda County Water District, 545 F.2d 1157, 1159-60 (9th Cir. 1976) (en banc) (accord). We therefore agree with the district court's holding in this case that the commerce clause does not limit the Government of Guam as it limits the governments of the states. The agreement does not violate the commerce clause.

We turn next to the plaintiffs' antitrust claims. The district court dismissed the antitrust claims on several alternative grounds, but we need to reach only the question of immunity. Plaintiffs acknowledge that acts of both state and federal instrumentalities are immune from antitrust liability. *See Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943); *Sea-Land Service, Inc. v. Alaska Railroad*, 659 F.2d 243, 244 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919, 102 S.Ct. 1274, 71 L.Ed.2d 459 (1982). Plaintiffs, however, try to fit this case within the line of Supreme Court cases holding that municipalities, unlike state goverments and federal instrumentalities, are not immune unless acting pursuant to clearly articulated and affirmatively expressed state policy to displace competition. *See Town of Hallie v. City of Eau Claire*, ____ U.S. ____, ____, 105 S.Ct. 1713, 1717, 25 L.Ed.2d 24 (1985); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 51, 102 S.Ct. 835, 840-41, 70 L.Ed.2d 810 (1982); *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 413, 98 S.Ct. 1123, 1137, 55 L.Ed.2d 364 (1978); *Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc.*, 753 F.2d 790, 792 (9th Cir. 1985). Much of the force of these cases has been prospectively overruled with the enactment of the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 90 Stat. 2750 (1984), effective after this lawsuit was filed.

In *Community Commmunication Co.*, the Supreme Court held that the City of Boulder was not immune from antitrust liability in connection with its policy of limiting competition in cable television. The Court reasoned that the city, a "home rule" municipality with rights of self government superseding the laws of the state, was not entitled to the immunity enjoyed by the state. The grant of home rule was not a "clear articulation and affirmative expression" of state policy regarding cable television regulation. *Community Communication Co.*, 455 U.S. at 54-56,

102 S.Ct. at 842-43, 70 L.Ed.2d 810.

Guam's relationship to the federal government is different from Boulder's relationship to Colorado. As we have seen, the government of Guam is an instrumentality of the federal government over which the federal government exercised plenary control. Congress has granted it far fewer powers of self government than the State of Colorado has granted the City of Boulder. There is no reason why Guam should enjoy less immunity than the federal government itself. *See Jet Courier Services, Inc. v. Federal Reserve Bank of Atlanta,* 713 F.2d 1221, 1228 (6th Cir. 1983); *Sea-Land Service, Inc.,* 659 F.2d at 246-47.

The only remaining contention which plaintiffs pursue on appeal is that because the contract permits delivery by only one company, the contract violates the equal protection clause. Because plaintiffs allege only economic discrimination, we need detemine only whether the contract has a rational relation to legitimate state interests. *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 489, 97 S.Ct. 1898, 1908, 53 L.Ed.2d 513 (1977); *Benson v. Arizona State Board of Dental Examiners,* 673 F.2d 272, 277-78 (9th Cir. 1982).

It is not disputed that the franchise agreement raises revenue for the airport, and revenue production is a legitimate state interest. *See San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 40-41, 93 S.Ct. 1278, 1300-01, 36 L.Ed.2d 16 (1973). Guam's interest in regulating traffic and security at the airport is also implicated. Plaintiffs claim that their deliveries will not in fact create serious traffic or security problems at the airport, but these claims,if true, do not serve to denigrate the legitimacy of the governmental interest in this regard.[2] The concession contract in this case does not deny equal protection.

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[2] Plaintiffs rely on *Park'N Fly of Texas, Inc. v. City of Houston,* 327 F.Supp. 910 (S.D. Tex. 1971). There the court found that a Houston ordinance which permitted only a city "shuttle bus" concessionaire to use favorable positions for loading and unloading passengers from distant parking lots had no basis, "much less a reasonable one." *Id.* at 925. There, however, the distinction between the concessionaire and others with similar vehicles actually created traffic congestion and hindered the ability of the airport to serve its primary obligations to passengers.

AFFIRMED.

HUG, Circuit Judge, concurring:

I concur in the result reached by the majority opinion and with the discussion relative to the antitrust claims. However, I am not fully convinced that the commerce clause does not apply to the Territory of Guam under the authority of *Andersen v. Mullaney,* 191 F.2d 123 (9th Cir. 1951), *aff'd* 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952). I find the distinction between the then Territory of Alaska and the Territory of Guam somewhat tenuous. However, I would not reach that issue because I would hold that the agreement in question places no burden on interstate commerce.

It is clear that the Airport Authority could grant to a concessionaire the exclusive right to sell merchandise in the airport after competitive bidding agreement. No party disputes this. The plaintiffs maintain that the agremeent does more than that; they claim that the agreement deprives them of a transportation facility essential to the shipment of their goods in interstate commerce. In my opinion, this is not the case. Plaintiffs can ship goods by air freight just as any other person can; nothing in the agreement deprives them of the use of the air carrier facility. What is denied to plaintiffs is the use of the airport to complete their sales transaction by delivering the merchandise to the passenger at the airport. The question is, thus, whether the commerce clause requires that the plaintiffs be allowed to use the airport to complete their sales transaction with the customer or whether the Airport Authority can require that delivery be made elsewhere. I would hold that the commerce clause does not prevent the Airport Authority from establishing this requirement. Goods delivered elsewhere to the passenger can be taken aboard by him and the plaintiffs are free to ship by air freight. There is no burden on interstate commerce, there is only a limitation on the use of the airport as a facility to complete the sale by delivery.